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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **MICHELLE MAZUR and SARAH BATES,**
16 **individually and on behalf of and all others**
Similarly Situated,

17 **Plaintiffs,**

18 **- against -**

19 **EBAY, INC., HOT JEWELRY**
20 **AUCTIONS.COM d/b/a JEWELRY**
21 **OVERSTOCK AUCTIONS.COM d/b/a**
22 **PARAMOUNT AUCTIONS, NEIMANS**
23 **JEWELRY, GOANTIQUES.COM, INC.,**
24 **and DOES 1-200, inclusive,**

25 **Defendants.**

Case No. C 07 3967 MHP

MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT
EBAY'S MOTION TO DISMISS
COMPLAINT PURSUANT TO
FED. R. CIV. P. § 12(b)(6)

Judge: Hon. Marilyn H. Patel

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1 Plaintiffs Michele Mazur and Sarah Bates (“Plaintiffs”), by their attorneys, Matthew A.
 2 Siroka and Craig Lanza of Balestriere Lanza PLLC, respectfully submit this Memorandum of
 3 Law in Opposition to Defendant eBay’s (“eBay” or “Defendant”) Motion to Dismiss the First
 4 Amended Complaint dated April 3, 2008 (“FAC”), pursuant to Rule 12(b)(6) of the Federal Rules
 5 of Civil Procedure.

6 **PRELIMINARY STATEMENT**

7 Defendant’s Motion to Dismiss the Complaint should be denied. In its memorandum of
 8 law dated May 2, 2008, eBay unpersuasively claims Plaintiffs have failed to state a claim under
 9 the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (“RICO”). eBay
 10 argues that Plaintiffs’ detailed, 70-page FAC, which depicts a classic hub and wheel conspiracy
 11 that defrauded thousands of class members over years, is not “plausible,” does not amount to a
 12 “pattern of racketeering activity,” and does not allege any harm from the reinvestment of eBay’s
 13 ill-gotten gains.

14 eBay is wrong. The FAC portrays more than a plausible conspiracy: it details a definite
 15 conspiracy between eBay’s top-brass and its co-defendants. The FAC further depicts how eBay
 16 engaged in a pattern of fraud over years and how eBay reinvested the proceeds in order to commit
 17 more fraud. For these reasons, eBay’s argument fails, and Defendant’s motion should be denied.

18 **STATEMENT OF FACTS**

19 For a complete rendition of the facts alleged, Plaintiffs respectfully refer the Court to the
 20 FAC.

21 **ARGUMENT**

22 **I. THE FIRST AMENDED COMPLAINT ADEQUATELY STATES A CLAIM FOR** 23 **RELIEF UNDER RICO**

24 Defendant has an extremely high standard to meet, as dismissal under Rule 12(b)(6) is
 25 proper only when a complaint exhibits either a “lack of a cognizable legal theory or the absence
 26 of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t,
 27 901 F.2d 696, 699 (9th Cir. 1988) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
 28

533–34 (9th Cir. 1984)). In addition, the Court must accept the facts alleged in the FAC as true.
See id.

A. Plaintiffs Have Alleged RICO Liability under 18 U.S.C. § 1962(c).

The FAC clearly alleges RICO violations under 18 U.S.C. § 1962(c). To state a claim under 1962(c), there must be a “pattern of racketeering activity.” Cal. Architectural Bldg. Produce U.S. Inc. v. Franciscan Ceramics, Inc., 818 F. 2d 1466, 1469 (9th Cir. 1987) (underlying illegal acts part of the same criminal episode). A pattern requires that the predicate acts be “continuous.” H.J. Inc. v. NW Bell Tel. Co., 492 U.S. 229, 239 (1989) (continuity required). The continuity requirement is met by evidencing a “threat of continuing activity.” Id. Courts have contrasted the continuity requirement with “isolated or sporadic acts.” Sun Savs. & Loan Ass’n v. Dierdorff, 825 F.2d 187, 191–94 (9th Cir. 1987) (a “pattern” under RICO does not require more than one scheme or episode provided the acts are not isolated events). In addition, “where an act or practice was only terminated because a lawsuit was brought, courts have held that the requisite continuity is established.” Proven Methods Seminars, LLC v. American Grants & Affordable Hous. Inst., LLC, No. CIV. S-07-01588 WBS EFB, 2008 WL 269080, at *1 (E.D. Cal. Jan. 29, 2008) (open-ended continuous pattern found where plaintiff removed misleading statement only after RICO counterclaims filed).

The FAC plainly alleges that eBay engaged in a series of misrepresentations from June 2004 to the present. (FAC ¶ 4.) Thus, eBay has clearly engaged in a *continuing* fraud. Indeed, eBay Live Auctions has continued to operate and post the same misleading information, even after this lawsuit was filed. Thus, the FAC does not describe an “isolated” event but, rather, how an on-going fraudulent scheme was committed over years defrauding thousands.

In order to avoid RICO liability, eBay falsely portrays its fraud as “a single predicate act.” (Mot. Dismiss FAC 6.) This is incorrect. “[P]redicate acts may constitute a pattern of activity under RICO even though only a single scheme or activity is involved. Proven Methods Seminars, 2008 WL 269080, at *1 (summarizing the holding of Sun Savs. & Loan Ass’n, 825 F.2d 187 (9th Cir. 1987)); accord H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989) (pattern of continuity

1 may be established by showing that acts are part of ongoing way of doing business).

2 The FAC does not allege that eBay made just one misrepresentation but, rather, “a series
3 of misrepresentations to encourage Class Members to make purchases and increase its bottom
4 line.” (FAC ¶ 38, emphasis added.) Specifically, the FAC alleges the following:

- 5 • eBay misrepresents the auctions as “very safe.” (FAC ¶ 35.)
- 6 • eBay misrepresents the auctions as “carefully screened.” (FAC ¶ 36.)
- 7 • eBay misrepresents that the auctions are run by reputable international auction houses.
8 (FAC ¶ 97.)
- 9 • eBay repeatedly and in multiple places describes the auctions as “live auctions” when
10 eBay knows that many of the auctions are fake. (FAC ¶¶ 33–34.)
- 11 • eBay refuses to engage in the due diligence it promises and does not enforce eBay’s
12 own shill bidding rules. (FAC ¶ 90.)
- 13 • eBay actively enables “hundreds of fraudulent and fake auctions to occur on a daily
14 basis” while at the same time making the misrepresentations above. (FAC ¶ 38.)
- 15 • eBay pockets tens of thousands of dollars per day in unjustly acquired profits made
16 possible by their misrepresentations. (FAC ¶¶ 76–78.)
- 17 • eBay maintained a website from July 31, 2004, through the present where all the
18 above misrepresentations and fraud have taken place. (FAC ¶ 4.)

19 In response to these allegations, eBay argues, in essence, that eBay cannot be held liable
20 under RICO because all of the misrepresentations took place on one website and, therefore,
21 constitute just one predicate act. If this were so, then fraudsters and criminals would have less
22 RICO liability (not more) by systematizing their fraud. According to this view, one can defraud
23 thousands but limit the misrepresentations to one website, one script, or one mailing and avoid
24 RICO liability. Such a view is clearly erroneous and would contravene the purposes of RICO.

25 Moreover, eBay’s “one predicate act” position is contradicted by the very cases eBay
26 cites. For example, eBay strangely relies on the case of Durning v. Citibank, 990 F.2d 1133 (9th
27 Cir. 1993). In that case, a putative securities class action, defendants issued one allegedly false
28

1 Official Statement which was distributed to multiple individuals. See id. In Durning, the Court
 2 upheld the district court's finding that, via the dissemination of the one Official Statement to
 3 multiple individuals, defendants had "performed *numerous predicate acts* of mail and wire
 4 fraud." Id. at 1139.¹ Thus, according to the reasoning outlined in Durning, eBay's repeated
 5 postings of misrepresentations on its website are clearly numerous predicate acts.

6 The FAC has clearly alleged numerous predicate acts of mail and wire fraud; accordingly,
 7 eBay's motion to dismiss should be denied.

8 **B. Plaintiffs Have Sufficiently Alleged A Conspiracy under 18 U.S.C. § 1962(d)**

9 Defendant incorrectly asserts that Plaintiffs claim for RICO conspiracy is based only on
 10 the parallel conduct of eBay and other defendants and is therefore insufficient under 1962(d).
 11 This is wrong.

12 "It shall be unlawful to conspire to violate any of the provisions" of RICO. 18 U.S.C. §
 13 1962(d). In addition, "a showing of parallel business behavior is *admissible circumstantial*
 14 *evidence from which agreement may be inferred . . . it falls short of conclusively establishing*
 15 *agreement . . . itself.*" Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1963 (2007) (quoting the
 16 district court as quoting Theater Enterprises, Inc. v. Paramount Film Distributing Corp., 376 U.S.
 17 537, 540–41 (1964)) (emphasis added).

18 Here, Plaintiffs use the parallel conduct of eBay's co-defendants as circumstantial
 19 evidence that there was an agreement between eBay and its co-defendants. However, Plaintiffs'
 20 allegations go on asserting further details of this conspiracy. For example, the FAC names
 21 specific individuals at eBay who had knowledge of the fraud and did nothing about it. (FAC ¶
 22 90.) The FAC also describes eBay's own fraudulent statements and how those statements make
 23 the fraud possible. (FAC ¶ 118.) Indeed, the FAC outlines an entire scheme, including the
 24 motivation behind it, the obvious in-concert participation, and the benefits received. (FAC ¶¶

25 ¹ The issue in Durning was not whether the defendants' actions amounted to one or more
 26 predicate acts. Clearly the Durning Court found the defendants engaged in numerous predicate
 27 acts *even if they had only disseminated one false Official Statement*. The issue in Durning was
 28 whether the defendants' misconduct was "continuous" or "isolated." See id. Here, eBay *does not*
 specifically challenge whether Plaintiffs alleged a continuous fraud simply because it *cannot*: the
 FAC plainly alleges an ongoing open-ended fraudulent enterprise.

1 117–24.)

2 This knowledge, combined with eBay’s co-defendants’ parallel conduct, compels the
3 conclusion that eBay and its co-defendants agreed to engage in fraud. It is the combination of
4 eBay’s knowledge of the misconduct, eBay’s inaction to prevent such misconduct, eBay’s own
5 fraudulent statements, and eBay’s co-defendants’ parallel behavior that is the crux of the
6 conspiracy allegation against eBay under § 1962(d). In its motion to dismiss, eBay challenges
7 each of these assertions separately and attacks each point as if it stands alone, not acknowledging
8 that Plaintiffs’ allegations combine several factual assertions which, taken *together*, create a
9 plausible inference of conspiracy.

10 Twombly supports the conclusion that the FAC adequately pleads a RICO conspiracy. In
11 Twombly, parallel conduct was the *only* fact propping up the plaintiff’s conspiracy claims. Here,
12 however, parallel conduct is but one of many factors. Twombly, thus, supports denying eBay’s
13 motion to dismiss.

14 eBay relies heavily on a non-binding case from the Southern District of Mississippi, Gray
15 v. Upchurch, No. 5:05cv210-KS-MTP, 2007 WL 2258906 (S.D. Miss. Aug. 3, 2007), to show
16 that eBay’s inaction is insufficient to support a conspiracy claim. But, unlike the plaintiff in
17 Gray, Plaintiffs do not rest their conspiracy claim *solely* on the allegation of inaction.

18 The court in Gray held that the plaintiff “made a huge leap of faith” in presuming that
19 “Mortgagee Defendants” must have been co-conspirators simply because they allegedly knew of
20 and did not prevent the alleged conspiratorial acts on the separate “Actor Defendants.” Here,
21 eBay not only knew about the co-defendants’ fraud, but eBay also made fraudulent statements.

22 Additionally, in Gray the “Actor Defendants” were not, as here, all engaged in the same
23 business and same fraudulent activity, instead they each acted fraudulently at different levels of
24 the real estate transaction. See id. at *2. Here, the rival co-defendants all concocted the same
25 fraudulent approach. Clearly, eBay’s co-defendants are the spokes, and eBay is the hub of this
26 conspiracy. eBay’s does not take into account the totality of Plaintiffs’ allegations; therefore,
27 eBay’s motion should be denied.

C. Plaintiffs Have Sufficiently Alleged That They Were Harmed By The Investment Of Racketeering Proceeds

Defendant asserts in a conclusory fashion that, as a matter of law, Plaintiffs' claim under § 1962(a) is insufficient. This is not so.

Once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as hypotheses are consistent with the complaint." Twombly at 1969 (quoting Sanjuan v. American Board of Psychiatry, 40 F.3d 247, 251 (7th Cir. 1994)).

Plaintiffs have alleged that eBay has engaged in an ongoing fraud and has reinvested the ill-gotten gains back into eBay to engage in further fraud. (FAC ¶ 464.)

Defendant cites the distinguishable case of Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137 (9th Cir. 2008). The court in that case held that plaintiff's injury stemmed only from the alleged predicate acts, whereas Plaintiffs here assert additional injury from the reinvestment of monies obtained in violation of § 1962(a) back into the enterprise by Defendant. Thus, Plaintiffs' 1962(a) claim is sufficiently pleaded and eBay's motion should be denied.

D. Plaintiffs May Allege Violations of Both Tort and Contract Law

Defendants incorrectly assert that "established law precludes a plaintiff from pursuing both contract and tort claims based on the same conduct." (Mot. Dismiss 6.) This is false.

Under California Law, a plaintiff may bring suit under contract and tort. See Wolk v. Green, 516 F. Supp. 2d 1121 (N.D. Cal. 2007) (under California Law, a plaintiff may bring suit on both contract and tort theories simultaneously, but must ultimately elect which remedy to pursue); see also Glensenkemp v. Nationwide Mut. Ins. Co., 344 F. Supp. 517 (N.D. Cal. 1972) (under the law of California different theories of recovery may be pleaded, however plaintiff cannot recover under both theories).

Here, Plaintiffs are well within their right to assert both claims at this early stage of proceedings, as a plaintiff can recover under both theories. See, e.g., Robinson Helicopter Company, Inc. v. Dana Corp., 102 P.3d 268 (Cal. 2004) (Plaintiff entitled to recover under both theories, holding supplier's affirmative misrepresentations upon which manufacturer justifiably

1 relied, constituted tort independent of breach of contract).

2 Here, Plaintiffs allege that Defendant's negligence is the result of a breach of duty
3 independent from the contractual obligations owed to Plaintiff by Defendant eBay. Contrary to
4 Defendant's assertion, under California law these circumstances give rise to an independent
5 action in tort which entitles Plaintiff to recover under both theories.

6 **CONCLUSION**

7 The FAC tells a detailed story of fraud and other misconduct perpetrated by Defendant
8 eBay, alone and in concert with eBay's co-defendants, and, therefore, should not be dismissed in
9 whole or in part.

10 Dated: San Francisco, California
11 June 16, 2008

Respectfully submitted,

12 *s/ Matthew A. Siroka*

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on the following counsel of record on June 16, 2008, via the methods listed below:

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